

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

2002 OAL Determination No. 3

February 22, 2002

Requested by: **MICHAEL J. VON HERRMANN**

Concerning: **DEPARTMENT OF THE CALIFORNIA HIGHWAY PATROL --
Rule determining the vehicle identification number of a vehicle
bearing more than one number**

**Determination issued pursuant to Government Code section 11340.5; California
Code of Regulations, title 1, section 121 et seq.**

ISSUE

Does the Department of the California Highway Patrol's rule designating the vehicle identification number of the frame as the vehicle identification number for a vehicle that is comprised of parts bearing more than one vehicle identification number constitute a "regulation" as defined in Government Code section 11342.600 which is required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act?¹

CONCLUSION

The Department of the California Highway Patrol's rule designating the vehicle identification number of the frame as the vehicle identification number for a vehicle that is comprised of parts bearing more than one vehicle identification number is a "regulation" which is required to be adopted pursuant to the Administrative Procedure Act.

1. The request for determination was filed by Michael J. von Herrmann, 7201 Pheasant Road, Fair Oaks, CA 95628. The Department of the California Highway Patrol's response was filed by D. O. Helmick, Commissioner, 2555 First Avenue, Sacramento, CA 95818. The request was given a file number of 00-009. This determination may be cited as "2002 OAL Determination No. 3."

BACKGROUND

At the time of his determination request, Michael J. von Herrmann owned a half-ton pickup truck he sought to register in California. The truck had previously been damaged to such an extent that Mr. von Herrmann replaced its frame with one from a comparable 1990 truck. Substantially all of the other parts of the truck are from the 1994 model year, with the major components bearing vehicle identification numbers confirming their manufacture for the 1994 model year². In the course of attempting to register his truck, he encountered the challenged rule utilized by the Department of the California Highway Patrol (“Department”) to determine the model year of a vehicle comprised of parts from more than one vehicle. The rule designates the vehicle identification number (“VIN”) of the frame as the controlling number for purposes of identification of the vehicle. The frame of his truck bears a VIN indicating it was manufactured for the 1990 model year. Mr. von Herrmann argues that the challenged rule is a regulation that was not adopted in accordance with Administrative Procedure Act (“APA”) procedures. He also complains that the rule effectively diminishes the value of his truck, making it four years older, and he points out the characteristics of his truck that are more in keeping with one from the 1994 model year.

Federal law requires vehicles and their major component parts to be marked with a VIN unique to each vehicle. (See generally 49 U.S.C. Chapter 331; 49 C.F.R., Parts 541, 565.) These laws are intended principally for the purposes of proper identification and theft and fraud prevention. 49 C.F.R., section 565.4, subdivisions (e) and (f) provide as follows:

“(e) The VIN of each vehicle shall appear clearly and indelibly upon either a part of the vehicle, other than the glazing, that is not designed to be removed except for repair or upon a separate plate or label that is permanently affixed to such part.

“(f) The VIN for passenger cars, multipurpose passenger vehicles and trucks of 4536 kg or less GVWR shall be located inside the passenger compartment. *It shall be readable, without moving any part of the vehicle, through the vehicle glazing under daylight lighting conditions by an observer having 20/20 vision (Snellen) whose eye-point is located outside the vehicle adjacent to the left windshield pillar.* Each character in the VIN subject to this paragraph shall have a minimum height of 4 mm. [Emphasis added.]”

When a damaged vehicle is repaired utilizing major parts³ from other vehicles, the repaired vehicle is likely to have more than one VIN associated with its various parts. If the Department were to rely upon the above-mentioned rule for placement of the VIN to select one VIN from among these numbers that would be recognized as the identifier of the vehicle, then the VIN would be the number atop the dashboard, adjacent to the left windshield pillar, and visible through the glazing. The difficulty with this simple solution is revealed by the Department in its “*Response to Request for Determination.*” Commissioner Helmick explains “[v]ehicle thieves

2. A vehicle’s VIN encodes its model year, in accordance with 49 C.F.R., section 565.6, subdivision (d), paragraph (1).

3. Major parts are listed in 49 U.S.C. section 33101 (6) and 49 C.F.R. section 541.5(a)(1) through (18).

will often remove or alter visible vehicle identification numbers, such as the one on the VIN plate, in an attempt to alter the identity of the vehicle and conceal the fact the vehicle is stolen. Therefore, it is not appropriate to use this number solely to identify a vehicle when that number differs from the number stamped on the frame.”

The Department's policy for reckoning with this dilemma is to recognize the frame number as the VIN. Explaining the rationale, Commissioner Helmick notes that “it is rare to find the identification number stamped on the frame altered or removed because of its inaccessibility.” He also indicates that recognition of the frame’s VIN as the primary number is “a well-established and accepted practice by automobile manufacturers, the insurance industry, law enforcement agencies, and the Department of Motor Vehicles” This practice, although common, is not one that is required by any law.

ANALYSIS

A determination of whether the Department’s rule for resolving a discrepancy between the frame number and other identifying numbers associated with the other components of a vehicle is a “regulation” subject to the APA (ch. 3.5 (commencing with sec. 11340), pt. 1, div. 3, tit. 2, Gov. Code) depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged rule is a “regulation” within the meaning of Government Code section 11342.600, and (3) whether the challenged rule falls within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly exempted by statute are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Gov. Code, secs. 11342.520 and 11346.) Moreover, the term “state agency” includes, for purposes applicable to the APA, “every state office, officer, department, division, bureau, board, and commission.” (Gov. Code, sec. 11000.) The Department is in the executive branch of state government, and therefore, unless expressly exempted by statute, the APA rulemaking requirements generally apply to the Department.

In this connection, Vehicle Code section 2402 provides:

“The commissioner [of the Department of the California Highway Patrol] may make and enforce such rules and regulations as may be necessary to carry out the duties of the department. Rules and regulations shall be adopted, amended, or repealed in accordance with the Administrative Procedure Act, commencing with Section 11370 [now sec. 11340] of the Government Code.”

Thus, the APA rulemaking requirements generally apply to the Department. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (an agency created by the Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

“(a) No state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [‘] regulation[’] as defined in Section 11342.600, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]”

Government Code section 11342.600, defines “regulation” as follows:

“... *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. [Emphasis added.]”

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274-275, agencies need not adopt as regulations those rules that reiterate a statutory scheme which the Legislature has already established. But “to the extent any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations”

Under Government Code section 11342.600, a rule is a “regulation” for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency’s procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251;⁴ *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

For an agency rule to be a “standard of general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556; see *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (a standard of general application applies to all members of any open class).) The challenged rule concerning vehicle identification applies to all members of the open class of persons who own a vehicle comprised of parts obtained from more than one vehicle. Membership in the affected class changes as vehicles are bought, sold and reconstructed from used parts. Consequently, the challenged rule on vehicle identification numbers is a standard of general application.

4. OAL notes that a 1996 California Supreme Court case stated that it “disapproved” of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. *Grier*, however, is still good law for these purposes.

Vehicle Code sections 2805 and 5505 authorize the Department and some of its employees to determine the proper identity of vehicles. Section 2805, subdivision (a), provides:

“For the purpose of locating stolen vehicles, (1) any member of the California Highway Patrol, or (2) a member of a city police department, a member of a county sheriff’s office, or a district attorney investigator, whose primary responsibility is to conduct vehicle theft investigations, may inspect any vehicle of a type required to be registered under this code, or any identifiable vehicle component thereof, on a highway or in any public garage, repair shop, terminal, parking lot, new or used car lot, automobile dismantler’s lot, vehicle shredding facility, vehicle leasing or rental lot, vehicle equipment rental yard, vehicle salvage pool, or other similar establishment, or any agricultural or construction work location where work is being actively performed, and may inspect the title or registration of vehicles, in order to establish the rightful ownership or possession of the vehicle or identifiable vehicle component.

“As used in this subdivision, ‘identifiable vehicle component’ means any component which can be distinguished from other similar components by a serial number or other unique distinguishing number, sign, or symbol.”

With respect to vehicles that have been reported as dismantled or total loss salvage, Vehicle Code section 5505 provides, in part:

“(a) This section applies to any vehicle reported to be a total loss salvage vehicle pursuant to [Vehicle Code] Section 11515 and to any vehicle reported to have been dismantled pursuant to [Vehicle Code] Section 5500 or 11520.

“(b) Whenever an application is made to the Department of Motor Vehicles to register a vehicle described in subdivision (a), that department shall inspect the vehicle to determine its proper identity or request that the inspection be performed by the Department of the California Highway Patrol.

“(c) The Department of the California Highway Patrol shall inspect, on a random basis, those vehicles described in subdivision (a) that have been presented to the Department of Motor Vehicles for registration after completion of the reconstruction process to determine the proper identity of those vehicles. The inspection conducted pursuant to this subdivision shall be a comprehensive, vehicle identification number inspection.”

The challenged rule is utilized by the Department in its implementation of these duties, clarifying the procedure to be followed when the officer is presented with a vehicle that is comprised of parts displaying more than one VIN. Thus, this rule which implements Vehicle Code sections 2805 and 5505, and governs the Department’s procedure is a “regulation” as defined in Government Code section 11342.600.

(3) With respect to whether the Department’s rule on VINs falls within any recognized exemption from APA requirements, generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Gov. Code,

sec. 11346; *United Systems of Arkansas, Inc. v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411 (“*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.*”) (Emphasis added.)

The Department does not contend that any *express* statutory exemption applies. Our independent research having also disclosed that no express statutory exemption applies, we conclude that none applies.

In summary, we conclude that the Department's rule designating the frame number as the VIN of a vehicle comprised of parts bearing more than one VIN is a “regulation” as defined in Government Code section 11342.600 which is required to be adopted pursuant to the rulemaking provisions of the APA.

DATE: February 22, 2002

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